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Written statement* submitted by Amnesty International, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[11 June 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Poland must take immediate steps to address interference with the independence of the judiciary- Amnesty International's written statement for the ID with the Special Rapporteur on the independence of judges and lawyers

At its 38th regular session, the UN Human Rights Council (HRC) will discuss the findings and recommendations of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland which took place from 23 – 27 October 2017.[1]

In his report, the Special Rapporteur highlights the fact that the Polish government has actively hampered the independence of the judiciary by enabling the executive and legislative branches to interfere with the administration of justice. Such interference threatens to have significant negative consequences for human rights in the country.

The Special Rapporteur's findings reflect Amnesty International's own research, which has concluded that legislative changes introduced by the government of Poland in 2016 and 2017 have eroded the independence of the judiciary. These "reforms" threaten the right to due process and other safeguards of a fair trial, guaranteed by the International Covenant on Civil and Political Rights, to which Poland is a signatory. The most significant aspect of the reform is that the laws governing all arms of the judiciary – Constitutional Tribunal, National Council of the Judiciary, common courts and the Supreme Court – have been modified to ensure that the executive can exert political influence over courts, judges, and judicial institutions. As they are functionally connected to each other, the reform has consolidated control over the entire judiciary in the hands of the government and the parliament, which is controlled by the governing party.

In August 2017, the amendment of the Law on Common Courts entered into force. It empowered the Minister of Justice to appoint and dismiss presidents and vice-presidents of courts. Pursuant to the amendment, the Minister dismissed 160 presidents or vice-presidents of common courts between August 2017 and early May 2018. There are 377 courts in Poland.[2] In March 2018, the government itself acknowledged that the Minister has replaced about 18% of presidents and vice-presidents of the courts.[3]

The amendment of the Law on the National Council of the Judiciary (NCJ) came into force in January 2018. The law gave Parliament the power to appoint the 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of members of the NCJ appointed by Parliament to six. On 5 March 2018, Parliament appointed the new NCJ members, eight of whom happen to be the new presidents or vice-presidents of courts appointed since August 2017 by the Minister of Justice.[4]

The Law on the Supreme Court entered into force on 3 April 2018. It introduced various changes, including lowering the retirement age for judges from 70 to 65 years. On 3 July 2018, the terms of 40 per cent of the currently sitting Supreme Court judges will expire. It is not yet clear how many of the retired Supreme Court judges will apply for an extension of their term and how many President of Poland will approve for such an extension. Any new Supreme Court judges will be elected by the new National Council of the Judiciary, which was elected in March 2018 by the Parliament

[1] UN Doc. A/HRC/38/38/Add.1, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/38/Add.1
[2] http://monitorkonstytucyjny.eu/archiwa/3982
[3] Executive summary of the government's White Paper on the Reform of the Polish Judiciary, March 2018, p. 5: https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf
[4] http://wyborcza.pl/7,75398,23108831,krakowa-rada-ziobrownictwa-zobacz-kim-sa-nowi-sedziowie.html

rather than by judicial self-governing bodies.[5] In addition, pursuant to the amendment of the law, the Supreme Court will also have lay members elected directly by the Senate.[6] The amendment of the Law on the Supreme Court also introduced two new chambers: the Disciplinary and Extraordinary Chambers.

The new Extraordinary Chamber will be able to reopen – within three years after entry into force – any final court decision that became valid after 17 October 1997.[7] This can be done without the knowledge or consent of the parties. The current Law on the Supreme Court also includes provisions that allow opening closed disciplinary proceedings against judges on the Minister of Justice's motion.[8]

The above-described changes have been subjected to strong criticism from the Council of Europe's Venice Commission, European Commission, OSCE Office for Democratic Institutions and Human Rights (ODIHR) and others.[9] On 1 June 2018, pursuant to a referral of the Irish High Court, the Court of Justice of the European Union (ECJ) held a hearing, in which it was expected to assess whether Poland was still operating under the rule of law, and whether extraditing a defendant from Ireland to Poland would involve a "real risk of being subjected to arbitrariness in the course of his trial".[10] The decision of the ECJ on the matter is expected by mid-July 2018.

Amnesty International would like to take this opportunity to reiterate some of its own concerns which are also highlighted in the findings of the Special Rapporteur.

First, the Special Rapporteur has emphasized that the government has undermined the independence of the judiciary as a system.[11] It is not a question of individual pieces of legislation, but rather the cumulative effect of the changes that threaten to have far-reaching negative consequences on human rights in Poland.

These changes affect the composition and functioning of common courts, the Supreme Court, the National Council of the Judiciary, as well as the Constitutional Tribunal. Amnesty International believes that such profound structural changes could be amended only by systemic reforms that will restore the independence of the judiciary in Poland.

Second, the Special Rapporteur has recommended that the Law on the Supreme Court should be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary. This should include "eliminating the provisions concerning the participation of lay judges in proceedings before the Supreme Court concerning extraordinary appeals and disciplinary cases". [12] The Special Rapporteur has also called for a review of the current broad subject-matter jurisdiction of the Extraordinary Chamber and the Disciplinary Chamber in line with his recommendations. Amnesty International's research indicates that the new regulation governing disciplinary proceedings does not comply with due process requirements. Nor are there safeguards to ensure that disciplinary proceedings will not be abused in politically-motivated cases against judges.[13] There are serious concerns over the operation of the future Disciplinary Chamber of the Supreme Court, which will be elected by the politicised National Council of the Judiciary. In addition, the first instance decisions into disciplinary proceedings will be made by

[5] Amnesty International, Comparison of the 4th Rule of Law Recommendation presented by the European Commission on 20th December 2017 and the amendments proposed by the government of Poland, April 2018:
http://www.amnesty.eu/content/assets/MythBuster-CommissionVsPoland.pdf

[6] Law on the Supreme Court, Art. 61. §2. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/U/D20180005Lj.pdf

[7] Law on the Supreme Court, Art. 115§1

[8] Law on the Supreme Court,Art. 124§1

[9] http://europa.eu/rapid/press-release_MEMO-16-2644_en.htm;
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e;
https://www.osce.org/odihr/315946?download=true

[10] Request for Preliminary Ruling Pursuant to Article 267 TFEU dated the 23rd day of March, 2018, paras 29 and 40
http://www.courts.ie/Judgments.nsf/0/FD843302847F2E228025825D00457F19

[11] UN Doc. A/HRC/38/38/Add.1, para 74

[12] Recommendation D(e), UN Doc. A/HRC/38/38/Add.1.

[13] Amnesty International. *"Reform" of the judiciary in Poland poses risk to the right to fair trial: Briefing by Amnesty International ahead of the General Affairs Council Meeting*. March 2018.

disciplinary panels within the common courts appointed by the Minister of Justice who is at the same time the Prosecutor General, entrusted with broad investigative powers.[14]

Third, the Special Rapporteur has also called for an amendment to the Law on Common Courts to remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts.[15] Amnesty International reiterates this call, particularly in the light of the government's downplaying its significance by arguing that the effect of this reform is mainly "administrative" and will not affect the way the judges adjudicate.[16] In fact, the court presidents have vast powers within courts. They can assign judges to the divisions, set out their duties, and play an important role in the case-management process.[17] By empowering the Minister of Justice to remove the presidents and vice-presidents of courts the law further enables the executive to exert political pressure on the judiciary.

In light of the Special Rapporteur's report, Amnesty International urges the Human Rights Council, its Members and Observer States to call on the government of Poland to:

- Constructively engage with the Special Rapporteur and act on his recommendations without delay;
- Urgently amend the Law on the Common Courts, the National Council of the Judiciary and the Supreme Court and remove any provisions that undermine the full independence of the judiciary and put the right to fair trial at risk.
- Ensure that judges can exercise their judicial functions free from retaliatory action or other forms of pressure, including politically motivated disciplinary proceedings, harassment and intimidation.

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[14] Art. 110a of the Law on the System of Common Courts.
[15] Recommendation C(a), UN Doc. A/HRC/38/38/Add.1.
[16] The Office of the Prime Minister of Poland. *The White Paper on the Reform of the Polish Judiciary*. 38 https://www.premier.gov.pl/files/files/white_paper_en_full.pdf
[17] Sadurski, W. *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*. The University of Sydney, Research Paper. January 2018, p 43.